

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

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UNITED STATES OF AMERICA										:
										:
-vs-										:
										:
MICHAEL MILAN,										:
										:
Defendant.										:
										:
										:
-	-	-	-	-	-	-	-	-	-	x

CASE NO. 1:09cr228

Courtroom 900
U.S. District Courthouse
Alexandria, Virginia

Friday, October 23, 2009

The above-entitled matter came on to be heard before the HONORABLE T.S. ELLIS, III, Judge, in and for the United States District Court for the Eastern District of Virginia, 401 Courthouse Square, Alexandria, Virginia, beginning at 10:26 o'clock a.m.

APPEARANCES:

On Behalf of the United States:

EDMUND POWER, ESQUIRE
Assistant U.S. Attorney

On Behalf of Defendant Michael Milan:

NINA GINSBERG, ESQUIRE

APPEARANCES: (cont.)

On Behalf of Defendant Lloyd Mallory:

STEVEN WEBSTER, ESQUIRE

On Behalf of Defendant Chris Evans:

DWIGHT CRAWLEY, ESQUIRE

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P R O C E E D I N G S

THE COURT: All right, call the next matter.

THE CLERK: Case Number 09 Criminal 228,
United States of America versus Michael Milan.

Will counsel please state your appearance for
the record?

MR. POWER: Good morning again, Your Honor.
Ed Power for the United States.

THE COURT: All right, Mr. Power. Who is here
for the Defendant?

Ms. Ginsberg, good morning.

MS. GINSBERG: Yes, Your Honor, I'm here on
behalf of Mr. Milan, who is in custody.

THE COURT: All right. We'll await the
arrival of Mr. Milan.

And who is here for the other defendant?

MR. CRAWLEY: Good morning, Your Honor.
Dwight Crawley on behalf of Mr. Chris Evans.

THE COURT: Yes. Good morning, Mr. Crawley.
And Mr. Evans, good morning to you, sir.

DEFENDANT EVANS: Good morning, Your Honor.

(Whereupon, Defendant Michael Milan entered
the courtroom.)

1 THE COURT: All right. He is present in the
2 courtroom. Good morning, Mr. Milan.

3 Let's put Mr. Milan in the first chair because
4 these are his motions.

5 Mr. Crawley, you don't have any motions before
6 the Court today; am I correct?

7 MR. CRAWLEY: That is correct, Your Honor.

8 THE COURT: All right.

9 MR. WEBSTER: Your Honor, Steven Webster for
10 Mr. Mallory, for the record.

11 THE COURT: All right, so there are -- I'd
12 forgotten. There were three.

13 MR. WEBSTER: Yes, sir.

14 THE COURT: All right. Good morning, Mr.
15 Webster. And Mr. Mallory is present in the courtroom.
16 Good morning.

17 DEFENDANT MALLORY: Good morning, sir.

18 THE COURT: And, Mr. Power, you're here for
19 the Government.

20 MR. POWER: Yes, sir. To be clear, I think
21 there's one motion that does apply to all three
22 defendants.

23 THE COURT: Which is that?

1 MR. POWER: Well, the motion to continue
2 applies to all three defendants.

3 THE COURT: Oh, I see. Yes.

4 What we have are, I think, six motions: a
5 motion for appointed counsel, from Ms. Ginsberg; a motion
6 to continue the trial date; a motion for Brady material;
7 a motion for the Government to produce 404(b) material
8 twenty days prior to trial; motion to suppress evidence
9 and for a Franks hearing; and a motion to sever the
10 obstruction of justice count.

11 Ms. Ginsberg, let's begin with your motion for
12 appointment of counsel. You've submitted an affidavit.

13 MS. GINSBERG: Yes, Mr. Milan submitted the
14 affidavit.

15 THE COURT: So, I take it he no longer has
16 assets.

17 MS. GINSBERG: He has no assets, Your Honor.

18 THE COURT: Now, it would be easy to appoint
19 you, and I am prepared to do so. Are you prepared to
20 accept that appointment?

21 MS. GINSBERG: Yes, Your Honor.

22 THE COURT: The only problem I have with that,
23 Ms. Ginsberg, is the issue of the conflict that was raised

1 in a previous hearing. That's the only problem I have.

2 Normally, I would take the opportunity to
3 appoint a conflict-free counsel. What is your view about
4 that?

5 MS. GINSBERG: Judge, I thought that we'd
6 resolved the issue of the conflict, but maybe if I step --
7 take a step back, I might be able to assist the Court.

8 THE COURT: All right.

9 MS. GINSBERG: I think it's appropriate to
10 advise the Court that there have been some plea
11 discussions. If --

12 THE COURT: All right -- I don't need to know
13 about that.

14 MS. GINSBERG: I'm not going to discuss --

15 THE COURT: I don't even need to know about
16 them. Let's do this. I'll go ahead and appoint you today
17 as counsel. However, what's the date of the motion for
18 the affidavit?

19 MS. GINSBERG: This past -- I believe the end
20 of last week.

21 THE COURT: All right -- I'll issue an order
22 that you were appointed counsel nunc pro tunc back to that
23 date. All right?

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MS. GINSBERG: Yes.

THE COURT: And you're appointed. So, that motion is granted.

MS. GINSBERG: Thank you, Your Honor.

THE COURT: Now let's -- we'll deal later if there's any problem.

MS. GINSBERG: I understand Your Honor's concern. And I think if Your Honor would consider hearing the continuance motion first, the Government -- I think this is an unopposed motion. The Government and I both believe that it might be very possible to save the Court's resources and put off any decision on the other substantive motions.

THE COURT: Well, the other matters are fully briefed.

MS. GINSBERG: Yes, sir.

THE COURT: So, I'll tell you what I'm going to do. Let me -- the continuance motion, which I rarely grant, is unopposed.

Is that right, Mr. Power?

MR. POWER: That's correct, Your Honor. In fact, we joined the motion.

THE COURT: That's right. And other counsel

1 are in agreement?

2 MR. WEBSTER: We are, Your Honor, for Mr.
3 Mallory.

4 THE COURT: Mr. Crawley?

5 MR. CRAWLEY: Your Honor, may I address the
6 Court?

7 THE COURT: Yes, you may.

8 MR. CRAWLEY: Your Honor, as the Court may be
9 aware, my client is scheduled to enter a plea on the 27th,
10 so we do not at this point believe we have a stake --

11 THE COURT: Well, as a practical -- as an
12 actual matter, no, I wasn't aware of that.

13 MR. CRAWLEY: Oh, I'm sorry, Your Honor. I
14 thought the Court was aware.

15 THE COURT: It may be scheduled in my
16 chambers, but I don't -- I didn't know that. But all
17 right -- so, it is of little consequence to you.

18 MR. CRAWLEY: That is correct, Your Honor.
19 And we would ask further that if the Court is inclined to
20 take up the additional motions that we be excused from
21 those hearings today.

22 THE COURT: Well, it's going to be done fairly
23 quickly, Mr. Crawley. You needn't worry about that.

1 MR. CRAWLEY: Oh, all right. Thank you, Your
2 Honor.

3 THE COURT: All right. I'm going to grant the
4 motion to continue. The question is, the trial date is
5 currently December 1st --

6 MS. GINSBERG: That's correct, Your Honor.

7 THE COURT: And what date have you all
8 discussed? Not that I may be persuaded by that, but I'm
9 certainly --

10 MR. POWER: Your Honor, I believe the
11 Defendant asked for a date four months -- excuse me -- a
12 continuance for four months. The only conflict for myself
13 within that time is I have securities for my trial
14 scheduled to begin on January 13th. I would anticipate
15 that trial taking approximately three weeks; that's before
16 Judge O'Grady.

17 So, we would request a date in late February
18 or early March, and I believe that's within the four-month
19 time frame. Certainly, if the Court would like to go a
20 full four months, we would not object to that.

21 THE COURT: Ms. Ginsberg -- or other counsel,
22 does that sound about right?

23 MS. GINSBERG: Your Honor, that sounds good.

1 THE COURT: All right.

2 MR. WEBSTER: Your Honor, may I address the
3 Court on behalf of Mr. Mallory?

4 THE COURT: Yes, you may.

5 MR. WEBSTER: Your Honor, you may remember
6 that Mr. Mallory is a CPA, and he is actively practicing
7 his profession. Setting a date immediately before that
8 April 15th deadline that we're all so familiar with would
9 be --

10 THE COURT: Oh, I'm looking at February.

11 MR. WEBSTER: Yes, Your Honor.

12 THE COURT: I'm looking at February 16th,
13 10:00 a.m. with a jury. It's almost four months but not
14 quite. And that --

15 Your case should be over by then?

16 MR. POWER: I would anticipate it ending by
17 probably the first week of February, Your Honor.

18 THE COURT: All right.

19 MR. POWER: As the Court knows, there's always
20 a little bit of time when I start to talk to witnesses
21 prior to trial that would actually, I think, shorten the
22 trial, given the opportunity to prepare.

23 If the Court would be inclined to push it a

1 bit more towards the end of February, I think that would
2 be advantageous.

3 THE COURT: Ms. Ginsberg, how about February
4 24th at 10:00 a.m.?

5 MS. GINSBERG: Your Honor, that's fine.

6 THE COURT: All right.

7 And Mr. Webster?

8 MR. WEBSTER: That's fine with us, Your Honor.

9 THE COURT: All right. You may be seated.

10 MR. WEBSTER: Thank you.

11 THE COURT: The other motions have been fully
12 briefed, and the record, I think, adequately reflects the
13 facts and the issues, with one exception that I'm going
14 to --

15 Is there a discovery order entered in this
16 case?

17 MR. POWER: There has been a discovery order
18 entered, Your Honor.

19 THE COURT: And there is -- and there's
20 essentially been open file discovery?

21 MR. POWER: Essentially yes, Your Honor. I
22 have not provided Jencks material or Giglio information at
23 this point.

1 THE COURT: All right.

2 MR. POWER: That will be forthcoming.

3 THE COURT: All right. So, I've granted the
4 motion for appointment of counsel; I've granted the motion
5 for a continuance.

6 The motion to sever counts, I will deny.
7 Under the Federal Rules of Criminal Procedure, it is
8 appropriate for the Government to join related counts.
9 These are related.

10 However, another rule of Federal Criminal
11 Procedure says that a motion may be made to sever those if
12 there is sound reason, prejudice to the defendant.

13 I looked at this matter for some time. The
14 parties have filed briefs on it. It's pretty clear that
15 the ten fraud counts -- or is it eleven? It's ten --
16 there's ten fraud counts --

17 Is that right, Mr. Power?

18 MR. POWER: There's a conspiracy count, Your
19 Honor, and then I believe there are nine fraud counts --

20 THE COURT: Nine substantive counts.

21 MR. POWER: Yes, Your Honor, and aggravated
22 identity theft.

23 THE COURT: And then, so Count XII is the

1 obstruction count?

2 MS. GINSBERG: Yes, sir; that's correct.

3 THE COURT: All right. So, there are eleven
4 counts that are either conspiracy or substantive bank
5 fraud counts and one identity theft count which goes along
6 with those.

7 And then the twelfth count is the obstruction
8 of justice which relates to the episode in which this
9 defendant fled to Iran, and when he came back he was
10 arrested and there was a hearing, and at the hearing the
11 Government would attempt to show that he was going to
12 offer evidence that he was incarcerated in Iran and that
13 that's why he couldn't return. And the Government was
14 going to show that the documents that he intended to offer
15 were fraudulent documents, and that would be obstruction
16 of justice.

17 Now, the reason for that being inextricably
18 intertwined with the fraud count is if you can show that
19 as part of the fraud case to show consciousness of guilt
20 when he flees and the like. So, it's admissible and it
21 would come in.

22 By the same token, if we tried the obstruction
23 count separately, the jury would -- that jury would have

1 to hear all about the fraud case as to know why he fled
2 and so forth.

3 So, it would involve two juries hearing
4 essentially similar evidence -- they're closely related --
5 and that's why it's appropriate to join them. And I don't
6 see unfair prejudice that requires a severance, so I'm
7 going to deny that motion.

8 I also have reviewed carefully the twenty-
9 three false statements relating to what's alleged to be
10 false statements in the affidavit supporting the search
11 warrant.

12 It is the law, of course, that if the
13 defendant shows a prima facie case that these -- that
14 their statements are false or that they were knowingly
15 false or made with reckless disregard or that they were
16 material to the probable cause determination, then there
17 would be a hearing at which evidence would be adduced on
18 that.

19 I've reviewed this record and all twenty-three
20 of these --

21 I've come to expect, Ms. Ginsberg, that you do
22 a very thorough job, and it is helpful that you put all of
23 those and that the motion is far from frivolous. It's a

1 substantial motion.

2 But I looked at all of those and determined
3 that, as I will put in an order, they were either not
4 false, or not materially false, and not made recklessly or
5 deliberately.

6 So, I will deny the motion for a Franks
7 hearing and to suppress the evidence, because there's
8 probable cause, ample probable cause, to support the
9 search.

10 I don't address the 404(b) or Brady motions.
11 I will postpone those. Let's wait and see what happens.

12 If the matter is not disposed of otherwise,
13 Mr. Webster and Ms. Ginsberg, you call that back to my
14 attention.

15 In the first place, I don't know if there is
16 any 404(b) evidence. And, I take it, Mr. Power, you're
17 not prepared at this time to tell me whether there is or
18 there isn't.

19 MR. POWER: We haven't made that determination
20 yet, Your Honor. And frankly, there's no indication --

21 THE COURT: Here's what concerns me, so that
22 you know if this happens.

23 I can anticipate why there might be 404(b).

1 404(b) evidence might consist of other fraudulent activity
2 relating to loans and the like, and that would involve
3 lots of documents.

4 And so, there may be, if you came up with five
5 or six or ten of those -- I might think that that would
6 require that you provide them a bit earlier so that they
7 can have an opportunity to look into them rather than
8 what's currently required under the Court's order.

9 MR. POWER: But certainly, Your Honor, I think
10 at this point I can state that right now we do not intend
11 to offer documents relating to deals not alleged in the
12 indictment.

13 THE COURT: All right. But we'll postpone
14 this matter, though, to the future.

15 MR. POWER: And I will say, just for the
16 record, Your Honor, I think there could be testimony from
17 witnesses to the effect of other fraudulent activities in
18 general as a pattern and practice.

19 THE COURT: Well, that may raise the same
20 problem as documents.

21 MR. POWER: Yes, sir.

22 THE COURT: We'll have to wait and see.

23 All right, so I have dealt with four of the

1 six motions, and there was one other motion.

2 Was that yours, Mr. Webster?

3 MR. WEBSTER: No, Your Honor.

4 THE COURT: Was there -- I have dealt with
5 the motion to appoint counsel that we nunc pro tunc'd to
6 the date of the affidavit, Ms. Ginsberg, so that you may,
7 when you submit your voucher -- you can go back to that
8 date.

9 MS. GINSBERG: Yes, Your Honor.

10 THE COURT: All right. Next, I granted the
11 motion for a continuance, I postponed -- deferred the
12 Brady material one, but I note -- well, let me do this.

13 I've looked at the order. The order requires
14 that the Government produce -- and the law requires that
15 the Government produce exculpatory material.

16 The only thing that I can see that the
17 Government has not done -- now, they may uncover
18 exculpatory material in the future which they're obligated
19 to turn over -- but the only thing they haven't done yet
20 is Giglio, which they are required to produce.

21 But it's hard for the Government to make a
22 determination about Giglio until they've made their sort
23 of final determination about the witnesses.

1 Is that right, Mr. Power?

2 MR. POWER: Yes, Your Honor, and additionally
3 the Jencks material.

4 THE COURT: And Jencks material. Well, that's
5 covered by the current order.

6 MR. POWER: Yes, sir.

7 THE COURT: I read this motion because it
8 also seems to suggest that there is Brady material of the
9 exculpatory nature that hasn't been produced, but it
10 doesn't identify that.

11 MR. POWER: Your Honor, I sent an email to Ms.
12 Ginsberg to try to answer a few of her specific questions
13 along those lines. But that's just -- I answered the
14 specific questions that I could answer. If we find other
15 information, I'll --

16 THE COURT: Well, let's do this. I'll deny
17 the motion with leave for you to renew it if you find that
18 there is something specific you believe exists and has not
19 been produced -- or some source that you think has not
20 been tapped.

21 MS. GINSBERG: I understand, Your Honor. And
22 the reason for the request is the different standards that
23 are applied in subsequent review whether -- depending on

1 the specificity of the request.

2 I believe that Mr. Power -- he has essentially
3 given us open file, but I do believe that there may be
4 exculpatory evidence that is within the knowledge of his
5 witnesses that he may learn and has not already --

6 THE COURT: Well, then he has an obligation.
7 He knows that.

8 MS. GINSBERG: I'm sure he does.

9 THE COURT: And I'm sure he will produce.

10 MS. GINSBERG: Yes. But I think that in order
11 to protect Mr. Milan's rights on appeal, the specificity
12 of the request is (inaudible).

13 THE COURT: All right. And I'll deny the
14 motion with leave for you to renew it should you have
15 reason to believe that Brady material exists and has not
16 been disclosed.

17 All right, then. The motion to suppress, I
18 denied; the motion to sever, I denied.

19 I thank counsel for your cooperation.

20 * * *

21 (Whereupon, at approximately 10:42 o'clock
22 a.m., the hearing in the above-entitled matter was
23 concluded.)

* * * * *

CERTIFICATE OF REPORTER

I, KATHLEEN M. ELIAS, a Certified Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings which I thereafter reduced to typewriting; that the foregoing is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Kathleen M. Elias, CVR
Certified Verbatim Reporter